IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) 19/2016

HELD AT MASERU

In the matter between:

'MASELLO T'SILOANE	**APPLICANT**
v	
TONY MTOMBENI	**1ST RESPONDENT**
O/C THETSANE POLICE STATION	**2ND RESPONDENT**
ATTORNEY GENERAL	**3RD RESPONDENT**

CHINHENGO AJA

(in Chambers)

RULING

Summary

Two applications made orally to Judge in Chambers - one for enrolment of an appeal against a spoliation order granted by the High Court and another for a stay of of execution of the judgment granting spoliation

First application to have been brought on notice of motion and good reasons given for it to be heard ahead of other matters lodged before it – fair administration of justice requires that matters be heard in the order in which lodged with the court except where compelling reasons exist - refusal to comply with terms of the spoliation judgment reason enough for application to be refused

Second application - brought as an interlocutory application in terms of Rule 10 as read with Rule 18 of the Court of Appeal Rules, 2006 seeking stay of execution of spoliation judgment - stay application dismissed by court ***a quo*** *– ordinarily, appeal to be noted against such decision of court* ***a quo*** *and not to be brought as an interlocutory application under Rule 10*

Both applications dismissed with costs

[1] This is an application for the enrolment this October 2016 Session of the Court of Appeal of one or other of two matters.

[2] The first matter is an appeal against a decision of the High Court (Sakoane AJ) delivered on 9 May 2016 granting an order of spoliation in favour of the 1st respondent. This matter was commenced by way of an urgent *ex parte* application on 25 July 2014. Interim relief was granted on 26 July 2014. In terms thereof the applicant and three other persons were ordered-

(a) to restore possession to the 1st respondent and allow him to take occupation of a residential premises at Ha Tsolo, in the District of Maseru;

(b) restore or handover the keys to the said residential premises.

The 5th respondent was ordered to assist the Deputy Sheriff to enforce the provisional order. Additionally the provisional order also restrained the applicant and the three other persons from interfering with the 1st respondent's occupation and possession of the premises and prohibited them disposing of any moveable property on the premises or going to the premises in the absence of the 1st respondent and without his consent. It was nearly two years before the final order was issued. The notice and grounds of appeal, which do not bear a court stamp, were apparently lodged with the court on or about 16 May 2016.

[3] The second matter is a decision of the High Court (Sakoane AJ) in which he dismissed an application for the stay of execution of the order in the first matter. This judgment was delivered on 13 June 2016.

[4] The applicant and the three other persons against whom the spoliation order was made did not, and have still not, complied with the orders of the High Court. The 1st respondent was constrained to approach the High Court for an order of contempt of court. To this end he instituted urgent motion proceedings on 3 June 2015 seeking an order that the four respondents therein immediately purge their contempt or otherwise be committed to goal for 30 days. This application has not been finalised.

[5] It is necessary for me to briefly outline the facts of this case, in particular those that appear to be common cause or those accepted by the judge a quo. The 1st respondent is a married man but is in the throes of a divorce. In 2011 he moved out of the matrimonial home due to matrimonial problems and commenced divorce proceedings. A draft order by consent has now been drawn up in an attempt to resolve the divorce matter.

[6] After the 1st respondent moved out of the matrimonial home he lived in rented accommodation together with the applicant's daughter, his lover, who was then a mother of one child. He alleges that after renting accommodation for sometime together with the applicant's daughter, they bought a piece of land and built thereon a three roomed house in which they lived together. They had one child before the applicant's daughter fell seriously ill, admitted to hospital and passed on in July 2014.

He further alleges that the applicant moved in to live with the two lovers after her daughter became seriously ill. She was living with them when her daughter passed on. Soon after her daughter's demise, the applicant and her relatives including the three other persons against whom the spoliation order was made, forcibly removed the 1st respondent from the premises on the strength that the premises belonged to the deceased. It is not in dispute that the premises are registered in the name of the deceased. The 1st respondent however alleges that the bulk of the funds used in the purchase of the premises and movables therein were his. The registration of the premises in the name of the deceased was agreed upon between him and the deceased because his divorce had not yet gone through. It is not in dispute that as at the death of deceased a lot of the 1st respondent's property of a personal nature was in the premises. This property included his clothes, bank cards and some valuable items that he sold as a businessman, which he is. The applicant opposed the orders sought on the grounds that the premises belonged exclusively to her daughter, that the 1st respondent was not living with her daughter and was not in possession of the premises and that he was not forcibly removed from the premises. She alleges that he was a mere boyfriend who occasionally visited the deceased and slept over at the premises. It is not necessary for me to go into detail about the allegations and counter allegations made by the applicant and the 1st respondent. Suffice it for the purpose of this application

to state that the judge *a quo* found in favour of the 1st respondent, hence the noting of the appeal and the application for a stay of the judgment.

[7] The application before me was made orally in Chambers following upon a letter dated 3 October 2016 addressed to the Registrar by applicant's counsel. In that letter he stated:

> *"We wish to inform you that in so far this matter is concerned we had applied for stay of execution pending appeal however the matter could not be moved because of the absence of the Justices of appeal.*
>
> *Now that the president of the court of appeal is available we humbly request for your indulgence and make an appointment with the president of the court of appeal on or before the 10/10/16 to hear us on the issue of execution pending appeal."*

[8] The above-mentioned letter was brought to the attention of the Acting President on 10 October 2016 whereupon I was deputed to deal with it. The President of this Court is empowered by rule 10(2) of the Court of Appeal rules, 2006 (Legal Notice No. 182 of 2006) to –

> *"(a) mero motu or on application, extend or reduce any time period prescribed in these Rules and may condone non-compliance with these Rules; or*

> *(b) give such directions in matters of practice, procedure and disposal of any appeal, application or interlocutory matter as he may consider just and expedient."*

[9] In terms of Rule 10(3) the President may designate another judge of appeal to exercise any power or authority vested in him by Rule 10.

[10] Rule 18 of the rules of this Court deals with interlocutory matters. It defines an 'interlocutory matter" as "any matter relating to a pending appeal the decision of which will not involve the decision of the appeal." It provides further that such interlocutory matter may be brought, on notice of motion to the opposing party and the registrar, delivered not less than seven days before the date set down for hearing, before a single judge of the appeal who may hear, refuse to hear or refer the matter to the Full Court.

[11] The present application was not brought on notice of motion. It was was made orally to me in Chambers. That is contrary to Rule 18. It thus did not provide the opposite party with the opportunity to deliver an answering affidavit not less than two days before the hearing as provided in Rule 18(4).

[12] Adv. *Molapo* did not sufficiently justify the procedure that he adopted. He said that he lodged the appeal in time and that although it is ready for hearing, the clerks in the registrar's office told him that there were far too many matters on the roll for the October session and that this particular appeal cannot be enrolled told him.

[13] *Adv. Phafane KC* opposed the application of the grounds that it offended Rule 18. He submitted that the roll was published in mid-August 2016 and as such the applicant had had ample time to lodge its application for the appeal to be enrolled but did not do so; that if the application were allowed it would set a bad precedent for the future; and that the 1st respondent's heads of argument have, in any case, not been prepared and delivered; as counsel for the 1st respondent he simply did not have the time to prepare the heads and generally ready himself for the hearing of the appeal on short notice.

[14] *Adv. Molapo* gave an explanation as to why he did not apply for the enrolment of the appeal soon after the roll was published. He said that the applicant lodged with the High Court an application for a stay of execution of the judgment and that the judgment refusing a stay was only handed down in June 2016. It seems to me that the applicant hoped that the stay application would succeed and that it would thereby render

it unnecessary for the appeal to be heard in the October 2016 session.

[15] I do not think that this would be a good enough reason for not making the application for the appeal to be enrolled. If the applicant really wished the appeal to be heard in the October 2016 session, that did not have to depend on the outcome of the stay application.

[16] *Adv. Molapo* also submitted that the appeal should be heard in this session because potentially the interests of the deceased's two minor children presently residing at the premises may be adversely affected arising from the fact that the spoliation order provides that the applicant may not go to the premises without the 1st respondent's permission. This, it was submitted, means that if the applicant cannot go to the premises the deceased's children in whose custody they are, may also not go there. I do not think that the interests of the children are adversely affected at all. The applicant has her own home and if the children are in her custody they can be accommodated at that home pending the determination of any application that either the applicant or the 1st respondent may lodge for the determination of the right to either inherit or occupy the premises in question. The children are only 10 and 2 years old.

[17] The fair administration of justice requires that all matters brought to the courts should be dealt with in the order in which they are lodged. There should be compelling reasons why an appeal should be heard ahead of others lodged before it. No such compelling reasons have been given by or on behalf of the applicant for the appeal to be enrolled in the October 2016 session. For this reason alone I would refuse to enrol the appeal as prayed.

[18] The second matter, as I earlier stated, is the application to this court for a stay of execution pending the appeal i.e., the application for a stay of the order restoring possession of the premises to the 1st respondent. This application is not without its own difficulties.

[19] As previously stated, the applicant lodged an application for the stay of the judgment of the High Court delivered on 9 May 2016 in terms of which the spoliation order was granted and against which the appeal discussed above was noted. That application for stay was dismissed on 16 June 2016. In reliance on the decision in *Motaung and Another v Pheko t/a Pheko Building Construction* LAC (2007-2008) 1, the applicant apparently lodged an application to this Court (the papers are not clear) for a stay of the judgment granting the spoliation order. That application, so it was submitted, was made in terms of Rule 10 of the Rules of this Court.

[20] I do not agree that on the facts of this case such an application should be countenanced. The facts in *Motaung* were different. In that case the appellants had been committed to goal for three months for contempt of court following their failure or refusal to pay a judgment debt after default summary judgment proceedings were determined against them in the High Court. The default judgment was one sounding in money (*ad pecuniam solvendam*). The appellants lodged an application for the rescission of the judgment. The respondent however moved the court *ex parte* for an order of committal of the appellants to prison on the ground that the appellants had obstructed the Deputy Sheriff from executing a writ of execution issued out on the basis of the default judgment. The judge then granted the application for committal but suspended it for one month on condition that the appellants complied with the terms of the default judgment within the period of suspension. The appellants noted an appeal against the contempt ruling to the Court of Appeal. They also lodged with the High Court an application for stay of execution of the contempt ruling pending the appeal. The stay application was dismissed thereby paving the way for the appellants' imprisonment for three months. The court accepted the appellants' contention that they had good prospects of success on appeal; that the judge *a quo's* refusal to grant a stay of the contempt ruling had the effect of frustrating the appeal because if the appeal were heard after

punishment was served it would be of academic interest only and the appellants would have suffered irreparable prejudice. The Court of Appeal was sitting about four months away and by that time the appellants would have served the punishment. At paragraph 5D of the report the learned judge stated –

> *"… the court a quo's refusal to grant a stay of execution in a matter in which the appeal would no doubt be rendered nugatory and indeed academic once the … appellants had served their three (3) months sentence before the next sitting of this court in 2001 actually created a crisis and a need to urgently convene a special sitting of the court which the … appellants legitimately demanded. Such a sitting of the court would, however, be convened at great expense. It was for this reason that I inquired from the respondent's attorney … whether he would insist on the imprisonment of the … appellants pending appeal or whether he would be opposed to a stay of execution of the sentence. [He] … insisted that the … appellants be committed to prison or pay up. Hence the special sitting of this court."*

The stay was, in the event, granted with costs against the respondents.

[21] What distinguishes *Motaung* from the present case are the circumstances set out in detail by the judge that would have rendered the determination of the appeal after sentence was served of academic interest only. In this case before me the order is for the applicant to restore possession of the premises

to the 1st respondent so that he may take occupation of it. The applicant does not suffer any irreparable prejudice from complying with the spoliation order.

[22] There are a number of other reasons that do not favour the applicant's case. First, the applicant and the three other persons against whom the spoliation order was made, have not complied with that order. Had the application been lodged in the proper manner by way of notice of motion, my attention would have, no doubt, been immediately drawn to the fact that the applicant and her relatives concerned in these proceedings have still not complied with the terms of the spoliation order. I would then have required the applicant to comply with the terms of the spoliation order or I would not entertain her application until she did so. Second, the stay application that the applicant would want this Court to deal with was heard by the court *a quo* and dismissed. Ordinarily the applicant would have to appeal against that determination and not resort to Rule 10 of the Rules of this court, as she has attempted to do. In my view Rule 10 is not designed to circumvent the lodging of an appeal where a lower court has given a judgment on the merits even if the matter would otherwise qualify as an interlocutory matter under Rule 18. Third, and by way of emphasis, the applicant is to blame for not making an application for the enrolment of the matter in good time. Even had he done so, I doubt that he would have had sufficient cause to satisfy me that

the appeal merited enrolment ahead of other matters lodged before it and also awaiting dates of hearing. As I have already stated the fair administration of justice requires that matters should be heard in the order in which they are brought to the court except in those cases where compelling reasons exist for a matter to be heard ahead of the other others lodged before it. Fourth the application to this court for the stay was apparently lodged on 14 June 2016. The 1st respondent filed his answering affidavit on 28 June. *Adv. Phafane KC* drew my attention to the fact that the applicant did not deliver her replying affidavit and for that reason did not seek to have the matter enrolled. In response *Adv. Molapo* stated that the applicant did not intend to file a replying affidavit. This came as a surprise to *Adv. Phafane KC* because this was the first time that the indication was made. To my mind the fact that the applicant has not taken adequate steps to ensure that the application that she intends to bring as an interlocutory matter would be heard during the October 2016 session is an indication that she was just taking a chance with the processes of this Court. Finally, as earlier stated, the application for the stay application to be heard as an interlocutory matter was not brought on notice of motion in terms of the rules. For these reasons the applications placed before me in the manner they were, should be dismissed.

[23] Accordingly the application for the enrolment of the main appeal in CIV/317/2014 and in which judgment was delivered

on 9 May 2016, and the application for the hearing of the stay application in terms of Rule 10 of the Rules of this Court, are both dismissed with costs.

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M CHINHENGO

JUSTICE OF APPEAL

FOR APPLICANT: Adv. LD Molapo

FOR 1ST RESPONDENT: S Phafane KC